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THE FIFTY MILES ORDER.

BY HISTORICUS.

Was the fifty miles order given by the Secretary of the Navy on November 2nd, 1903, many hours before there was a revolt at Panama against the government at Bogota, an illegal order if tested by the Thirty-fifth Article of the New Granada Treaty of 1846? The answer depends upon a critical historical inquiry, the nature of which I can now only give in the merest outline.

The following is a transcript of one of the orders:

NAVY DEPARTMENT,

WASHINGTON, D. C., November 2, 1903.

GLASS, *Marblehead, Acapulco*:

Proceed with all possible dispatch to Panama. Telegraph in cipher your departure. Maintain free and uninterrupted transit. If interruption is threatened by armed force, occupy the line of railroad. Prevent landing of any armed force, either Government or insurgent, with hostile intent at any point within 50 miles of Panama. If doubtful as to the intention of any armed force, occupy Ancon Hill strongly with artillery. If the *Wyoming* would delay *Concord* and *Marblehead*, her disposition must be left to your discretion. Government force reported approaching the Isthmus in vessels. Prevent their landing if in your judgment landing would precipitate a conflict.

DARLING, *Acting*.

What will be the practical effect if the question shall be answered in the affirmative? That question is here irrelevant. It will be for Congress to hereafter consider. The present Congress can condone, as it probably will do, or it can condemn.

The effect of any diplomatic notes, or arrangements, between Washington and Bogota, since the Treaty of 1846 was exchanged, upon the right of the President to intervene in the internal affairs of Colombia, either by way of aiding Colombia to execute her engagements with the United States, or to prevent the landing of Colombian troops on the Isthmus under certain circum-

stances, will depend on the text of those as yet unrevealed notes, or arrangements, when they shall have been made public in conformity with Senator Gorman's very practical and explicit resolution of inquiry.

The theory first suggested on September 2nd, 1903, in "*Le Matin*" of Paris, by the present Minister at Washington of the republic of Panama, and upheld by the President in his recent special Message to Congress—which implies that the nations have, by their representatives, assembled in international conference, invented and proclaimed a new rule of public law in regard to the proprietary rights of Colombia, Panama, or Nicaragua, in the land and water of an Isthmian crossing, have empowered and requested the United States to be the representative of the nations in executing, in respect to a canal, a new article of the international code, and also to be the mandatory of "collective humanity," in the phrase of Mr. Varilla, or of "collective civilization," in the terms of President Roosevelt, to excavate a canal, by a preliminary process of condemnation of the needed land and water to the uses of the canal, by right of international eminent domain, or international socialism—will not be now discussed.

. It is established by documents recently published, which accompanied the Treaty of 1846 when it was sent to the Senate by President Polk, that our *chargé d'affaires* who negotiated that treaty acted "upon his own responsibility and without instructions." Mr. Buchanan has made that assertion twice,—once as Secretary of State, and once as President when sending to the Senate on April 5th, 1860, a treaty with Honduras. It is also established by those documents that the Thirty-fifth Article was not proposed to New Granada by the United States in order to obtain a right of way over the Isthmus. The chief object which the American negotiator had in mind was to rid the United States of injurious preferential duties which were then levied by New Granada on merchandise imported into her ports in American vessels. As compensation for the abrogation of those preferential duties, New Granada proposed to grant to the United States an Isthmian right of way, but the United States was to protect the sovereignty of New Granada over Panama against the aggressions of Great Britain, and France, and also against the United States herself. President Polk hesitated to send the treaty to the Senate

on account of that proposed guarantee by the United States, and after he finally had decided to send it for ratification, and did make the transmission, it remained in the Foreign Relations Committee of that body for more than a year. The Whig opposition took no interest in the treaty. When it was finally presented for final action in the Senate, not more than a third of the Whig Senators took the trouble to vote on it. It was reported in the newspapers of the day as having received the full Democratic vote chiefly because it had been sent in for ratification by President Polk.

It was New Granada that pressed the Thirty-fifth Article upon the American negotiator, who does not appear to have asked from her any surety that the United States be secured in the things promised. He did not exact a stipulated right in the United States to enforce those things in Panama territory if New Granada failed in her engagement, and for the reason, probably, that he did not in 1846 appreciate the need. Indeed, it would not have been quite feasible to adopt a stipulation that the United States should have the right to enter within Colombian jurisdiction with her officials, in order to enforce Colombia's stipulations in the treaty.

One who carefully notes the character and variety of the several stipulations made by Colombia, will realize the impracticability of imparting to the United States such a right of supervision.

The first stipulation, for example, of the Thirty-fifth Article is "that the citizens, vessels and merchandise of the United States shall enjoy, in the ports of New Granada, all the exemptions, privileges and immunities, concerning commerce and navigation, which are now or may hereafter be enjoyed by Granadian citizens, their vessels and merchandise." It would have been unreasonable for the United States to ask that New Granada permit American officials to prevent in Panama a denial of that engagement.

The second stipulation is, "that this equality of favors shall be made to extend to the passengers, correspondence and merchandise of the United States, in their transit across the said territory, from one sea to the other." It would obviously have been impracticable to permit United States officials in Panama to identify the things and to execute that stipulation.

Another stipulation is, that no other tolls, or charges, shall be levied, or collected, upon the citizens of the United States, or their said merchandise, thus passing over any road, or canal, that may be made by the government of New Granada, or by the authority of the same, than is, under like circumstances, levied upon and collected from the Granadian citizens; that any American products thus passing to and fro, "for the purpose of exportation to any other foreign country, shall not be liable to any import duties whatever, or, having paid such duties, they shall be entitled to drawback upon their exportation." No independent government could be expected to permit a foreign government to enter its jurisdiction to enforce such an engagement.

In the middle of the Thirty-fifth Article, and intermixed with such stipulations, is the one declaring that "the Government of New Granada guarantees to the Government of the United States that the right of way, or transit, across the Isthmus of Panama, upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the United States." There seems to be no reason why officials of the United States should have been permitted by New Granada to enter the jurisdiction of Panama to enforce that stipulation any more than to enforce any of the other stipulations already referred to.

Some three or four years after the New Granada treaty was signed, a concession to build and operate a railway in Panama was granted by Colombia to a New York corporation. The corporation did not claim that the treaty had given the concession. The treaty had stipulated that any future "road, or canal," over which a free transit should exist, must be one "that may be made by the Government of New Granada, or by the authority of the same." The railway was in 1855 completed and in running order. The New York corporation, receiving the concession, agreed to make to Colombia therefor an annual payment of two hundred and fifty thousand dollars, which sum Panama will now probably claim must be paid to her by virtue of the recognition of her independence and her succession to the former government of Colombia from which she has successfully seceded. It is said to be an historical fact that the negotiation of that concession by the railway suggested to the United States the need of obtaining, in future transit treaties, the stipulation of

a right in the United States to physically enforce the freedom of transit when obstructed. In a subsequent treaty concluded with Mexico in 1850, such a stipulation was inserted. On page ninety-eight of the second volume of Professor Wharton's "International Law Digest," it appears that Secretary Marcy attempted in 1856 an amendment in that direction of the New Granada treaty, but that government refused to negotiate.

Early in 1853, the Mexican Government authorized American citizens to construct a plank road and railroad across the Isthmus of Tehuantepec. In order to secure the stable benefits of said transit, Mexico, by a treaty concluded with the United States in that year, stipulated that she would protect with her whole power the prosecution, preservation and security of the work, and also agreed to the novel stipulation that "the United States may extend its protection, as it shall judge wise, to it, when it may feel sanctioned and warranted by the public, or international, law." Had such a stipulation been contained in the New Granada treaty of 1846, the question now presented regarding the recent fifty miles order given by the Navy Department might not have arisen, provided that order had been given and executed in good faith, simply to protect the Panama Railway in its right under the treaty as a common carrier, and without ulterior purposes of self-interest and ambition which would have been "criminal aggression."

Fourteen years later, after a multitude of ineffectual attempts by previous Secretaries of State, a treaty was negotiated with Nicaragua (and ratified, for a wonder), for similar preservation and protection of a transit route through that country. Therein it was stipulated that Nicaragua shall always employ the requisite force for that protection, and, upon failure to do that from any cause, the Government of the United States might, "with the consent, or at the request, of the Government of Nicaragua, or of the Minister thereof at Washington, or the competent, legally appointed local authority, civil or military," employ such force for that purpose, but for no other. And then came a novel stipulation, which is to the effect that, in the exceptional case "of unforeseen, or imminent, danger to the lives, or property, of citizens of the United States, the forces of said Republic are authorized to act for their protection without such consent having been previously obtained, but no power or duty imposed upon, or con-

ceded to, the United States by the provisions of this article, shall be performed, or exercised, *except by authority, or in pursuance of, laws of Congress hereafter enacted.*" Nicaragua seems, at that time, to have had more confidence that the Congress of the United States would act justly, and not in a filibustering spirit, than it had in the Executive. If a similar stipulation were in the New Granada treaty of 1846, many of the pending questions of treaty interpretation and international law would probably not have arisen. But there was no such stipulation, and the historical evidence is that New Granada refused to consent to give such power to the United States. Did she fear what came to pass last November?

How many Secretaries of State have within the last half-century endeavored to make treaties with one or another of the governments of Central America in regard to Isthmian crossings, and how many of those treaties have perished in the process of ratification by the legislative authority of one government or the other? Secretary Cass endeavored many, under direction of President Buchanan, but not one of them emerged into life out of the furnace of ratification.

The need of a stipulation with Colombia authorizing the United States to enter with its officers into the Department of Panama, in order to protect the railway, was, in April, 1856, very painfully brought into view by a riot at Panama after the arrival there of nearly one thousand passengers who had landed at Colon, had been transported across the Isthmus, and were at Panama awaiting the arrival of a steamer to take them to San Francisco. The disturbance began by an altercation, between a drunken passenger and a Panama negro who sold fruit near the railway station, over the refusal of the former to pay a dime for a slice of watermelon. A pistol-shot was fired. Thereupon, the riot began. Loaded cannons were used. Panama police took possession of the station. There was bloodshed and plunder. Twenty persons were killed, twenty-nine wounded, and there was a loss of over half a million dollars of property. Secretary Marcy demanded reparation under the Treaty of 1846, and expressed his expectation that, after what had happened, "New Granada will station a military force along the route of the railway, and at Colon and at Panama, such as will secure adequate protection." Negotiations to that end were not concluded while Marcy remained in office.

They were carried on by Cass, his successor. During those negotiations, it was not suggested by anybody that the United States had engaged to maintain uninterrupted, or unembarrassed, transit over the railway. New Granada conceded her obligation to do it, but insisted that the Treaty of 1846 had not enlarged, or varied, the duty of all governments, under the law of nations, to preserve peace and good order within their territories. She denied that she had engaged to be an insurer. Finally, on September 10th, 1857, a treaty was concluded at Washington, by which New Granada "acknowledges its liability arising out of its privilege and obligation to preserve peace and good order along the transit route," and stipulated that all claims, growing out of the riot at Panama shall be referred to commissioners for ascertainment of the damages and the sums due.

There was no intimation that the United States had engaged to protect the transit, or had any responsibility for preserving good order along the transit route. After a long delay, and the interposition of a second commission, New Granada made pecuniary reparation to the United States for the damages inflicted.

There were, about this time, many things done by Panama officials in violation of the treaty. Among others, there was an attempt to levy a tax of more than three dollars on every pound of mail matter transported across the Isthmus, the aggregate of which would have been more than two millions of dollars annually. Panama authorities undertook to impose tonnage duties on foreign vessels in Panama ports, and also to require American citizens, passing across the Isthmus, to pay a head-tax. Those attempts so exasperated Secretary Marcy that he wrote, on December 31st, 1856, to the American Minister at Bogota, a minatory note, to the effect that the United States would resist by its naval forces at Aspinwall and Panama any *forcible* attempt by New Granada to lay a tonnage tax upon vessels of the United States at those ports. President Pierce, in his last Annual Message to Congress, referred to those repeated violations at Panama of the Treaty of 1846, and said:

"I have deemed the danger of the recurrence of scenes of lawless violence in this quarter so imminent, as to make it my duty to station a part of our naval force in the harbors of Panama and Aspinwall, in order to protect the persons and property of the citizens of the United States in those ports, and to insure them safe passage across the Isthmus, and

it would, in my judgment, be unwise to withdraw the naval force now in those ports until by the *spontaneous* action of the Republic of New Granada, or otherwise, some adequate arrangement shall have been made for the protection and security of a line of interoceanic communication so important, at this time, not to the United States only, but to all maritime states both of Europe and America."

The Cabinet of Pierce had in it Marcy, Caleb Cushing, Jefferson Davis and Guthrie, who were not likely to endure patiently such conduct toward American citizens in violation of treaty obligations. Their strength in Congress was so great that they felt certain of ratification and approval by it of whatever might be done in the direction indicated by the President. At the same time, it will be noticed that Pierce did not either land, or propose to land, a military force upon the Isthmus, until he had been authorized by Congress.

The years 1855-6 seem to have been, for some reason, cyclonic years on all of the Isthmian crossings. There was a great deal of ill-feeling and improper conduct between citizens of the United States, going to and fro across the Isthmus between the Atlantic and Pacific oceans, and the mixed races,—white, black, red, yellow, half-breeds and hybrids, who were the inhabitants of the Isthmus. In addition to that, there were pecuniary disputes between Central-American governments and American *concessionaires*, which were aggravated by filibusters from New Orleans and California who invaded some of those Central-American states under Kinney from New Orleans, and Walker from California.

Early in the first half of the last century, the Accessory Transit Company, under the head of Commodore Vanderbilt, had obtained a concession from Nicaragua for the transportation of passengers and freight, which continued in successful operation, with great advantage to the public, till 1856, when the route was closed by Nicaragua, and the grant to the Company, as well as its charter, summarily and arbitrarily revoked. The United States endeavored in vain to compose the strife. The result was war between Costa Rica and Nicaragua, and that competition ceased between the rival routes of Panama and Nicaragua, and, in consequence, unjust sums were exacted for transportation to and from California. It was to that condition of things that Secretary Cass alluded, in the note to one of our Ministers in Central

America from which President Roosevelt quoted, and to which he referred in each of his recent Messages to Congress as if General Cass had declared that, in the absence of a treaty giving a right, the United States could lawfully force the opening of a transit route in defiance of the government having jurisdiction thereof. The quotation was explained, modified and interpreted by Cass in a subsequent note to be found on the sixteenth page of the third volume of the "International Law Digest." If the President had read that note, he owed it to Cass and Congress to invite attention to the interpretation given by the author. President Buchanan, in his second Annual Message of December 6th, 1858 (Vol. V., Richardson's Papers, page 515), referred to the petty controversies between the Government of Nicaragua and its *cessionnaires*, and declared that:

"Whilst their rights of sovereignty ought to be respected, it is the duty of other nations to require that this important passage shall not be interrupted by the civil wars and revolutionary outbreaks which have so frequently occurred in that region. The stake is too important to be left at the mercy of rival companies, claiming to hold conflicting contracts with Nicaragua. The commerce of other nations is not to stand still and await the adjustment of such petty controversies. The Government of the United States expect no more than this, and they will not be satisfied with less. . . . If disputes arise between it (Nicaragua) and those with whom they may have entered into contracts, these may be adjusted by some fair tribunal provided for the purpose, and the route must not be closed pending the controversy. This is our whole policy, and it cannot fail to be acceptable to other nations."

President Buchanan did not express a purpose, on his part, or on the part of the United States, nor did his Secretary of State, to condemn, by right of eminent domain, land in a foreign jurisdiction. That would have been the doctrine of the "Ostend Conference" which Marcy rebuked.

The critical period in the relations between the United States and Central-American governments, growing out of the Isthmian crossings, was from March, 1852, to March, 1861, when the War of Secession began; and a clue to all that was done, under either Pierce or Buchanan, can be seen in their Annual, and in many Special, Messages to Congress relating to the subject, all of which can be found in the fifth volume of "Richardson's Papers," and especially on pages 368, 416, 518, 538, 569, 585 and 643. By comparing what Pierce said upon the subject in his

last Annual Message (page 416) and the opinions expressed by his successor, it can be discerned how much, if at all, the two differed in regard to the right of the President to enter upon the jurisdiction of a Central-American state in order to secure the execution of a guaranty of free transit. A single paragraph taken from Buchanan's second Annual Message to Congress (page 516) will sufficiently indicate his view of the constitutional relation between the executive and legislative authorities of the United States. He said:

"The executive government of this country in its intercourse with various nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It cannot legitimately resort to force, without the direct authority of Congress, except in resisting and repelling hostile attacks. It would have no authority to enter the territories of Nicaragua, even to prevent the destruction of the transit and protect the lives and property of our own citizens on their passage. It is true that, on a sudden emergency of this character, the President would direct any armed force in the vicinity to march to their relief, but in doing this he would act upon his own responsibility."

Buchanan in each Annual Message urged Congress to enact a law authorizing the Executive to employ the naval force at his command for the purpose of protecting the lives and property of American citizens passing in transit across the Panama, Nicaragua, and Tehuantepec routes, against sudden and lawless outbreaks and depredations; but Congress steadily refused to make such an enactment.

In his third Annual Message, he argued the question with Congress, saying, among other things, that "the chief objection urged against the granting of this authority is, that Congress by conferring it would violate the Constitution, that it would be a transfer of the war-making, or, strictly speaking, the war-declaring, power to the Executive. If this were well founded it would of course be conclusive. A very brief examination, however, will place this objection at rest." His argument was that Congress could as well confer power upon the President to exert force should a case occur in the future, as to wait until the mischief had been done and then confer authority, when perhaps the remedy would be too late, and that "to confer authority to make war in order to meet future cases, under circumstances strictly specified, is as clearly within the war-

declaring power, as such an authority conferred upon the President by an Act of Congress after the deed had been done."

Congress refused to confer the power.

Those opinions were expressed by President Buchanan after the treaty with Mexico of 1853 had been made, which authorized the United States to apply force in its discretion to protect the crossing at Tehuantepec, but he insisted, nevertheless, that Congress should authorize the President to use force even in the execution of such a treaty.

Looking back over the last half-century of events in Central America, and the collisions that have occurred between the governments of that part of the world and the United States, a great deal of toleration for Central America cannot fail to be felt, on account of the character of the inhabitants with which those governments have had to deal. If when the Spanish-American states to the south of us had obtained their independence of Spain, they had adopted a policy, in regard to the relation of the colored races to the new governments established, similar to that which the successors of those who landed at Jamestown and at Plymouth Rock established in North America, the result would probably have been very different. But they did not! They did not do that which Chief-Justice Taney declared, in the *Dred Scott* case, those did who framed the Federal Constitution, and the several State constitutions—which was, not to regard the black, red or colored races as citizens, or members of the body politic. That great and good Chief-Justice, "the purest of earth or sky," did not say that, at the time of the adoption of the Federal Constitution, "a negro had no rights which a white man was bound to respect," which he has been so persistently quoted as saying; but he did say that a negro had been considered, for more than a century before that period, as a being of an inferior order. Mexico, Central America and South America have paid the penalty for adopting a standard, possibly more humane and philanthropic, for the selection of those fitted to vote, and to participate in framing and maintaining a political government.

HISTORICUS.